In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Reply Brief of Petitioner

On Petition for a Writ of Certiorari to the United States Court of Claims

The quotation of Rule 40 of the Court of Claims as set forth on page 6 of the brief in opposition is incomplete, the notation to see Rules 45 and 46, which appears as the concluding sentence of Rule 40, has been omitted. This reference to Rules 45 and 46, and the cross reference in Rule 45 to see Rule 40, indicates that the provisions of Rules 40, 45 and 46 must be considered together in order to arrive at their full meaning.

The Act of Congress of February 24, 1925 (43 Stat. 964), authorizing the appointment of commissioners of the Court of Claims states in part as follows: "That to afford the Court of Claims needed facilities for the disposition of suits brought therein said court is hereby authorized and empowered to appoint seven competent persons, to be known as commissioners, who shall attend the taking of or take evidence in cases that may be assigned to them severally by the court and make a report of the facts in the case to the court. Any commissioner shall proceed under such rules and regulations as may be promulgated by the court and such orders as the court may make in the particular case, and may have and perform the general duties that pertain to special masters in suits in equity. He may fix the times for hearings, administer oaths, examine witnesses, and receive evidence." In view of the provision of the above Act, that commissioners shall attend the taking of or take evidence in cases, there is no ambiguity in the meaning of Rules 40 and 41, as is implied on page 6 of the brief in opposition. Rules 40½(d), 42 and 44 of the Court of Claims, indicate that commissioners shall take, hear, rule upon and receive evidence, in conformity with the requirements of the above Act. It seems unnecessary to cite authorities to support the well settled principle that the rules of any court of the United States must conform to the provisions of the Constitution of the United States.

In view of the provision of said above Act, that a commissioner may have and perform the general duties that pertain to special masters in suits in equity, the attempt to distinguish the case of *Smith v. Dental Products Co.*, 169 F.2d 516, set forth on pages 8 and 9 of the brief in

opposition, lacks merit. The commissioners of the Court of Claims are, in fact, trial judges so far as the facts are concerned.

In reply to the footnote at the bottom of page 5 of the brief in opposition, stating that petitioner failed to object to change of commissioners until after the report had been made, it will be noted that Commissioner Foster was appointed on February 3, 1950 and filed his report on February 16, 1950. This short interval of time when considered together with the length of time required for communications from Washington, by regular mail, to be delivered to petitioner in San Francisco, shows that petitioner did not have sufficient time to prepare and forward an objection to the change of commissioners before the said report was filed.

The holding by this Court in *Labor Board v. Mackay Co.*, 304 U.S. 333, cited on page 7 of the brief in opposition is inapplicable in this case, as the facts and conditions are entirely dissimilar to those in this case. The National Labor Relations Board is not a court, and its proceedings are administrative rather than judicial; Section 10(b) of the National Labor Relations Act (49 Stat. 449, 454), provides that "the rules of evidence prevailing in courts of law and equity shall not be controlling." The holding in *National Labor Relations Board v. Stocker Mfg. Co.*, 185 F.2d 451 (C.C.A. 3, 1950), cited on page 8 of the brief in opposition, is likewise inapplicable in this case, for the same reason.

Respectfully submitted,

THOMAS M. SMITHER,
Petitioner.